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ABSTRACT

This document briefly traces the history of sex education in the United States and the problems and disagreements that it has created. The recourse of parents objecting to sex education in the schools has generally been at the community level, taking the form of electing to the school boards those candidates who reflect their views. In some cases, objecting parents have resorted to bringing formal charges against the schools in court. Several cases of this sort are cited in this paper, indicating that for the most part these cases are unsuccessful. Some alternatives to accepting public school sex education courses are discussed. (JD)

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Controversy In The Community:
Sex Education and the Law[1]

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[1] This project was completed as part of the requirements for the degree of Master of Arts in Education, Concentration in Health Education, Beaver College, Glenside, Pennsylvania.

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Running head: Controversy

CONTROVERSY IN THE COMMUNITY:
SEX EDUCATION AND THE LAW

Sex education programs in the public schools have long been a source of disagreement between parents and school authorities. Controversy has often accompanied such programs, controversy which has not been limited to grumbling among parents or to outspoken behavior at school board meetings. A number of parents have been so disturbed that they have brought legal action against their school boards to have the offending sex education classes completely eliminated from the curriculum.

It is difficult to explain why sex education, more than any other area, brings out such antagonism. Are all the parents who rise up "throw-backs" to an age when sex was never mentioned? Do these parents fear the influence of sex-educated "liberals," whose children have lost respect for their country and whose lack of values may be transmitted to the children of the less "permissive?" Perhaps, the fear is engendered, instead, by sex education teachers - "strange, breathy creatures whose peculiar lusts /are/ warmed by a classroom full of teenagers."[1] Some parents hope that if

sex is ignored, it will go away:

> "They don't need to know, talk, study so much about sex. Leave it alone and the kids will be better off."
>
> "Why should my thirteen year old have to learn things she never heard about from some stranger?"
>
> "They might put some ideas in her head she don't /sic/ know about."[2]

For whatever personal reasons, many parents view the area of sex education as super-sensitive and believe that they and they alone should have the exclusive right to educate their children about sex. Whenever their recognized "fundamental interest in the education of their children" urges them to attempt more and more curricular control, controversy and furor result.[3]

While it seems simple to accept the interest a parent has in his child's education, in the field of sex education, too many parents are so "emotionally involved with their children" that they are unable to teach it properly,[4] and so it becomes the duty and the responsibility of the public school's professional staff, "by virtue of its training and experience," to establish within the curriculum such sex education courses as may be called "Human Growth and Development."

There is no reason, however, for one to expect sex education to be a subject taught exclusively in either the school or the home. In fact, the Guidelines for Sex

Education in the Public Schools of Pennsylvania, Department of Education (Harrisburg, Pennsylvania 1969) state that sex education should be the shared responsibility of "home, church, school and community," with the school's main responsibility to see that "accurate information and trained leadership are available" so that youngsters can "confront the physiological, psychological, social and ethical implications of sexuality" in a responsible manner, making responsible, well-based choices. The Department of Education is committed to the development of each student's whole personality and views sex education as "implicit" to this commitment.[5] Long before the United States was conceived, the Northwest Ordinance Article III called for education to be encouraged "forever." By the nineteenth century, education was not only the privilege of Americans, it had also become a duty.[6]

The State's interest in sex education extends beyond simply educating students and helping them to grow to responsible adulthood. Sexual ignorance is financially costly. Adoption arrangements, foster parent plans, welfare grants, and orphanages are expensive to establish and to run. In addition, the prevention of venereal disease, mostly caused by ignorance of transmitting methods and ways to control it, is in the interest of public hygiene, and indeed, there are a number of organizations on record as supporting sex education in public schools.[7]

> "In an enlightened society no area of inquiry relevant to the human condition should be foreclosed, particularly when the

personal and societal costs of ignorance are so consequential."[8]

Inadequate sex information can also be responsible for sexual dysfunctioning among some adults. Among those who were treated at the research center founded by Dr. William H. Masters and Dr. Virginia E. Johnson, it was found that women suffering from orgasmic dysfunction and from vaginismus all exhibited a lack of authoritative sex information. Starting from their childhood, any discussion involving sex "as a component of the pattern of living" was omitted, and the eventual sexual tensions, misconceptions, and taboos led to the fears and apprehensions which manifested themselves in some sexual handicap - "...theirs is a desperate need for definitive information."[9]

There is no doubt that the State has a duty to educate children; it requires an "informed citizenry." Parents, on their part, have a double duty. They owe their children an education and they owe the State the duty to educate the child, as well. Therefore, both the State and the parents share a two-way street.[10]

Occasionally, the children, themselves, are consulted. In one survey involving boys and girls from thirteen years old to nineteen years of age, 80% of those taking part agreed that "sex education courses in school are valuable for young people." Sexually inexperienced boys and girls do not necessarily have a lack of curiosity about sex; they learn about sex from others

equally as inexperienced. Sex education courses taught in school can answer their questions in a manner they tend to respect.

> "Maybe they're afraid they'll teach us how to seduce somebody, /but/ they've got to satisfy our curiosity. If they don't, more guys and chicks will go all the way to find out for themselves... will do it to find out if it's really as bad as they say. Just tell us, that's all, and let us decide." (emphasis added)

Experimentation is no more inviting when sex education is taught in a school environment. In fact, peer pressure would seem to be the most powerful force for sexual experimentation. Among his peers, although information is usually vague and inaccurate, it may be no worse than that obtained at home or in church, where morality may be over-emphasized and physiology skipped or skimmed over. Any message from the mass media can be subtle, insinuative, and commercially oriented to the physical side of sex. Pornography, while not so easy to obtain, can have an undue influence on a child since he tends to keep it a secret and his parents get no chance to comment on its content. Some of the trauma of pornography can be divested by sex education whereby the subject matter and material are discussed as part of an instructional program and where familiarity can lessen its impact. If sex is taught about in school, there seems to be no reason why home, family, and religion

cannot all work together to impart moral and ethical standards.[12]

When parents are invited to supplement at home what is taught in school by answering their children's questions about sex, the communication lines between parent and child can open up. When parents are invited to discuss plans for the sex education course before classes get under way (for example, in a forum entitled "Sex Education: What Do You Parents Want Us To Do About It?"),[13] there is less friction between home and school system. Community acceptance of a course of study is as important as any legal right, and the community in which a program is to be implemented should play a strong role in both the study and development of such a program.[14]

For any new sex education program to be feasible, it should have no legislation against it, and in addition, it should have enough funds to continue the program once begun. There should be enough time allotted for the courses to function well, and the timing of such a program should be as accurate as possible for those involved as students - neither before they are ready nor after their curiosity has been satisfied elsewhere. All teachers in the sex education program should be properly trained and prepared.[15] However, since sex education occurs all the time in both school and home (science, biology, sociology, psychology, history, peer and family interrelationships), it may be more tactful for a school to announce plans to enlarge upon or strengthen their already existing sex education program rather than to use the word "begin."[16]
To some people, sex education is the answer to unwanted preg-

nancy, venereal disease, and "sterile conceptions about human sexuality contained in pornography" to others, it means examining everything related to the human condition.[17]

Since most parents recognize that sex and human life are intermingled, one might wonder why any parent would try to prohibit its being taught in the public schools. Opponents to these courses (often called "Family Life" or "Human Sexuality") believe that when the State takes over the educational task of informing children about sex, it imposes a "state selected moral code...in violation of the establishment clause of the First Amendment," a point that has been raised in each sex education litigation.[18] /Amendment I states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."/[19] However, before a parent can challenge a set course of study, informally or in a court, he should be familiar with the regulations and rules of his own state School Code.

In Pennsylvania, for example, the Pennsylvania Public School Code Sch 1511 /supplemental/ states that "health, including physical education and physiology" be taught. The Board of School Directors gets its authority from the State Board of Education, through the Secretary of Education. This was approved by a supplemental regulation by the State Board of Education effective July 1, 1969, allowing the Board of School Directors "the greatest...flexibility in curriculum planning..." including "such additional

courses...in the general areas of family studies."[20] It is clear that in Pennsylvania, the school boards have been specifically directed to provide students with courses related to sex education. This is not the case throughout the entire United States, nor is the authority of a school board to set curriculum sufficient to discourage some perturbed parents from demanding their "rights."

Parents who object to a sex education curriculum may choose to remove their children from public school and enroll them in a private institution conforming to their own philosophy; they may decide to keep the children at home and have private tutors; or they may attempt to elicit change in their public school systems. In 1964, the Economic Opportunity Act was passed, and for the first time, it became possible to sue the federal government regarding education. This Act appropriated funds for locally administered programs, based on education improvement, to combat poverty. Therefore, if parents elected to carry their challenge to the courts, such action was open to them, with four channels from which to choose. They may sue for: Number 1 - "breach of a state constitutional, statutory or common law duty;" Number 2 - "breach of a federal statutory duty;" Number 3 - "vindication of a federal constitutional right;" or Number 4 - some combination of these. Number 1 is rarely successful because there are so many states which make up the United States public school system, with much discretion on the State's part. Number

2 has not been tried so far because of its comparative novelty. Number 3 is difficult for the courts to consider since the Constitution does not contain any "direct provisions concerning education" but leaves education up to the individual states. Number 4 is ruled out as a combination of largely unsuccessful attempts.[21]

Each state has its own discretionary power regarding education, and each school system within the state has its own centralized body that sets policy and maintains order. Traditionally, the school's power is based upon "in loco parentis," the teachers assuming the same authority as parents over students within the school.[22] When controversy develops, the teacher often bears the burden of attack, and this is true for sex education teachers as well. However, the court has seen fit to protect the teacher's constitutional freedom as guaranteed in the First Amendment, basing its opinion on the fact that the state's decision to include (or not to include) a specific subject in the public school curriculum does not give a state the right to make it a crime for a teacher to "mention the very existence of an entire system of respected human thought." /Epperson v. Arkansas, 393 U. S. 97 (1968)/[23] Despite the ultimate power of the courts, they most often have referred cases regarding the education (or mis-education) of children in public schools back to the local school boards for final decision.[24]

Not all anti-sex education cases get remanded to local school boards by the courts; one notable case never

strayed from the local level, though repurcussions were far-reaching.

Since Spring 1965, the Anaheim, California School Board had been running a course called "Family Life and Sex Education" (FLSE), for junior and senior high school students, the foundations of which had been laid in the summer of 1962 when a committee composed of members from twelve recognized public service organizations began work on establishing sex education courses devoted to producing "morally responsible students," in the public schools of Anaheim. There seemed to be no problems until Summer 1968, when the Christian Crusade organized a number of "decency committees" and published a well selling pamphlet entitled "Is The Schoolhouse the Proper Place To Teach Raw Sex?" At the same time, the California Citizens Committee, soon to be called the "Antis," mobilized itself "for a crusade." At school board meetings, they gave presentations and had speakers who attacked FLSE, claiming it was masterminded by SIECUS (Sex Information and Education Council of the United States). They pointed out that tax money was being spent where parents didn't want it used, that the school board elections were coming up, that children should be protected from the information that would continue to be taught (especially regarding masturbation), and that sex education was a "Commie plot." They regaled the crowd with personal tales of how the books and courses had proven to be a bad influence on their children. The scene was set for "a contest between the Now generation and the Hereafter

tradition of America's aging backwoods metaphysics."

The year 1969 saw the accusation by radio broadcaster Dan Smoot that sex educators were "debauching" young people, while the newspapers reported that thirty states were involved in "sex education battles." It was also the year that a Louisiana congressman entered a "series of anti-sex education articles" into the Congressional Record; a pamphlet called "Sex Education. Assault on American Youth" was distributed in Washington, D.C. by an old employee of the "ultra right-wing Liberty Lobby;" the John Birch Society began a crusade against sex education as its "Movement to Restore Decency" (MOTOREDE) expanded across the country; and in Washington, D.C., the headquarters of the National Education Association (NEA) reported that it had on file a list of more than one hundred anti-sex education committees.

In March 1969, Orange County students gathered at the Disneyland Hotel for a conference at which they supported sex education, changes in dress codes, and student government, suggestions to which they wanted the different district school boards (including Anaheim) to respond.

The Anaheim School Board elections took place in April 1969. The results showed that out of three available board seats, two had been won by opponents of sex education in the schools. Anaheim, which was to have served as a model program for sex educators throughout the

United States, had risen up as a community to repudiate the very program they were to have perfected.

Following the election results, the California State Legislature, in Summer 1969, passed a law barring from a sex education class any child who did not bring with him written permission from his parents. In addition, through the efforts of State Senator John Schmitz, California teachers were in danger of losing their credentials if they allowed any child without a written parental permission slip to enter a sex education class or if any materials to be used in sex education classes had not been displayed first "in a well-advertised and convenient place for parents' perusal." By the Fall, no one got sex education classes; they were not given at all.

The parents who had favored sex education in the Anaheim classrooms were not completely destroyed, however. They formed their own organization in March 1970, calling it PEP (People for Educational Progress) and hoping to get sex education back in school through dominance of the School Board. They knew it would be a slow process, taking at least two more elections at the earliest, but they seem to have alienated more people than they won over. The controversy continues, with PEP apparently alone and outnumbered but with no move from any faction to bring the controversy into courts of law.[25]

Although there have been relatively few court cases on the issue of sex education in the public schools,

there have indeed been a small number of lawsuits brought by unhappy parents, generally resulting in unfavorable decisions against them. In Hawaii, litigation developed over the State Department of Education's sponsoring an educational television series on sex education. /Medeiros v. Kiyosaki, Civil No. 27353 (1st Circuit Court Hawaii, April 21, 1969 - appeal docket No. 4918)/ The contention was that sex education in public classrooms constituted an invasion of privacy and a violation of religious freedom[26] (granted by the First Amendment). The final decision of the court /Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P. 2d 314 (1970)/, however, considered the fact that the parents, in this case, had had the opportunity to have their children excused from the sex education classes (as also occurred in the Anaheim controversy), and therefore, the course did not violate the parents' constitutional rights.[27] In addition, they rejected the move that the series of films, which had been shown to a sixth grade class, was illegal "on the theory that it was adopted by improper delegation of authority by the state board of education."[28] These parents also believed that their personal liberty to decide all matters regarding the education of their children had been violated, a concept shared by other litigants in other cases.

In a similar suit, civil action was brought on behalf of school children and their parents, calling themselves "taxpayers" of Baltimore County, Maryland, to prevent a program of sex education from being implemented in the Baltimore County

schools /Cornwell v. State Board of Education, U. S. District Court 314 F. Supp. 340 (D. Md. 1969), affirmed 428 F 2d 471 (4th Cir. 1970)/ by having the Court declare By-Law 720, Section 3, Subsection 4 (adopted by the State Board) unconstitutional, since they, as parents, had the sole "constitutional right to teach their children about sexual matters in their own homes." Such home-based education would relieve the schools of the right as well as the "...responsibility...to provide a comprehensive program of family life and sex education...for all students..." as set forth in the By-Law under dispute. The Court ruled that there is no such constitutional right.

The Plaintiffs also claimed that the above-described By-Law violated the First Amendment and the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. /Amendment Fourteen states "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."/[29] Regarding the First Amendment, the parents said that the "free exercise of their religious concepts" were denied and that, in addition, to teach sex in the Baltimore County schools would be setting up religious concepts. In response to this point, the Court cited other cases regarding the federal government's establishing a church or aiding or preferring specific religions /School District of Abington Township v. Schempp 374 U. S. 203, 225 (1963); Epperson v. Arkansas, 393 U. S. 97 (1968) -

considered to have been the "successor case to the Scopes trial;" and Prince v. Massachusetts, 321 U. S.151 (1944)7 and states that the health of the children in the State is more important to the State than "claims based upon religious freedom and the right of parental control." The Equal Protection Clause of the Fourteenth Amendment was not considered by the Court since all pupils were to be involved equally (including any pregnant students). The Due Process Clause was rejected immediately since the State Board is supposed to set and enact educational policies. Based on these decisions and the cases cited, the Court ruled against Plaintiffs, stating that not only was the federal question insubstantial but that "the constitutional questions relied upon /were7 obviously without merit."[30]

In another important suit /Valent v. New Jersey State Board of Education, Superior Court of New Jersey, 114 N. J. Super. 63, 274 A. 2d 832 (1971)7, the case history goes back to January 1967, when the New Jersey Board of Education first set the policy for sex education in State schools. By July 1969, public controversy had made itself felt, and the Commissioner of Education was requested to keep all local boards of education from starting any new sex education programs. However, the Board of Education in Parsippany-Troy Hills (the district in which the three children of the Plaintiffs attend school) proceeded to institute a "Human Sexuality" course. A turn-about by the State Board of Education through the Commissioner of Education occurred in

July 1970 when the moratorium on new programs was called off. The State Board went so far as to refuse to excuse any child from sex education classes if the local School Board decided to hold them, saying that such excuses might then be expected to extend to classes in biology, history, English, and so on. At this point, the Valent's brought suit, alleging that the public schools had intruded "upon religious dogma contrary to the First Amendment to the United States Constitution..."

The Defendants were not without support. The Director of Curriculum in Human Sexuality signed an affadavit averring that the curriculum was not offensive to "any religious doctrine or religion" and that a house-to-house survey by the State Board, local Board, and the Junior Chamber of Commerce in the Parsippany-Troy Hills School District showed that the people felt sex education was "necessary and beneficial for the students." These surveys were ruled out by the Court, however, on the basis that majority rule in matters of conscience and religion cannot be permitted to determine outcome, for if it were, the First Amendment would not then be needed.

Although the case was eventually dismissed on "grounds unrelated to the merits, i.e., the Plaintiffs had failed to exhaust administrative remedies by not asking the State Board of Education to consider exempting their children from the otherwise required sex education course," [118 N. J. Super. 416, 288 A. 2d 52 (1972)][31] and although the Court upheld the previous ruling of the Commission of Education

and the State Board of Education that "conscience" is not a valid reason to be excused from sex education courses, the Plaintiffs are considered to have won some victory. The Court ruled against the Defendant Board of Education on two related points. First, the school had the right to offer sex education classes but did not have the right to enforce attendance, an act which could be viewed as encroaching on the student's free exercise of his or her religion.[32] Secondly, there were questions regarding the possible alternatives to the program and regarding whether the state's interest in requiring attendance was more important than the right to religious freedom guaranteed by the Constitution of the United States.[33]

As the Medeiros, Cornwell, and Valent cases indicate, sex education in the schools could become a major issue for the courts to decide. The alleged violations of Constitutional rights have been rejected where the Court finds the State's interest in the children to be superior to that of the parents, although a proper balance between the two would be most beneficial to all. No case thus far has conferred upon parents the right to "dictate" a curriculum, and certainly no one wants the courts to interfere in the daily operation of schools or to resolve the normal conflicts which often do arise. /Epperson v. Arkansas 393 U. S. 97, 104 (1968)/[34] On the other hand, when clear abuses occur, the courts should be there to adjudicate matters.[35]

In lawsuits of record, courts have viewed sex education as "a public health measure" [Cornwell], pertaining to "the public welfare" and so "necessary for the public good" [Clemner v. Unified School District #501, Case No. 112,064, Dist. Court of Shawnee County, Kansas (1970)], and "one of the significant measures to be taken by the state to solve social problems" [Medeiros]. It is interesting to note that in those states (Michigan, Illinois, and Idaho) which have specific laws permitting sex education in public schools, there has been no litigation in this matter.[36] In 1969, Tennessee enacted a statute [Tennessee Code Ann §49-1924 (Supp. 1969)] that restricts the teaching of sex education unless the State Board of Education and local school boards approve, unless the sex education courses are taught as part of general high school biology, physiology, health, physical education, or home economics. If a teacher fails to comply, he has committed a misdemeanor, Therefore, it follows that in Tennessee, if a psychology teacher (for example) wants to teach sex education, he needs special permission while a home economics teacher does not, and a physical education teacher cannot hold a voluntarily attended sex education class since it would not be regarded as a "general high school course," as specified in the Code.[37]

It seems clear that parents, school boards, teachers, and administrators are all involved in the issue of sex education in the public schools, but what of the students themselves? Opinion surveys have shown that they favor sex education in school,[38] that they would most like their teachers to be just slightly older than they (for example, ten year olds and younger would be taught by junior high school students, junior high children by high school students, and high school students by college age youngsters),[39] and that the only organized instruction in sex they obtain may be that offered by church or hospital on one special night a year.[40] Back in 1874, a court decision /Peck v. Smith, 41 Conn. 442 (1874)/ held that a student should be expelled for using "profane language" in the school environs.[41] It is certainly doubtful that the courts would rule the same way today. In Peter Doe v. San Francisco Unified School District /Superior Court of California, San Francisco County, filed 11/20/72/, the Plaintiff sought "general and punitive damages of one million dollars" for the failure of his schools to "provide him basic literacy" by the time he got his diploma.[42] Perhaps it follows then that students will eventually bring suit against school systems for lack of proper sex education.

In those situations where parents have believed that sex education in the school was harmful to their children, they have reacted strongly. However, when parents decide to oppose state authority by stopping or limiting educational processes, one may wonder if the State should

follow the parents' directives. Eventually, it might be possible for parents thus to stop any controversial issue from being discussed in the classroom. Certainly, the courts have tended to overrule claims by parents that the State has trespassed on Constitutional rights. Perhaps this represents an inclination to end repressive guidelines and censorship wherever they may occur. Sex education, as the courts are preparing the way, could play as important a role in the curriculum as any traditional school subject, fulfilling along with other courses the goal of all education - to prepare the foundations on which the quest for knowledge is based and to help each student to become a caring, responsible adult.

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